IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10799 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TUBE PRODUCTS INCORPORATE

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 10799 of 2004
MS AMRITA M THAKORE for Petitioner No. 1
MR JITENDRA MALKAN for Respondent No. 1
DS AFF.NOT FILED (N) for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 27/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. Rule. Learned Standing Counsel Mr.J.M.Malkan waives service for the respondents.

#. Heard the learned counsel for the parties. Ms.Thakore for the petitioner and Mr.Malkan for the respondents.

#. Show cause notice was issued on 31.12.2002 demanding duty of Rs.48,000/- on goods sent to M/s Hindustan Petroleum Corporation, Mumbai seeking imposition of interest and penalty in respect thereof. It was confirmed vide order in original passed by the Additional Commissioner of Central Excise and Customs on 29.08.2003, against which appeal was filed before the Commissioner (Appeals), Central Excise and Customs, Vadodara which was partly allowed by an order dated 28.01.2004 (Annexure `A') whereby the demand, penalty and interest in respect of non-endorsement of the invoices was set aside, however, rest of the order passed by the Additional Commissioner was confirmed. This was challenged in appeal before the Customs, Excise and Service Tax Appellate Tribunal (for short "CESTAT") by the petitioner on 05.05.2004 along with stay application for waiver of pre-deposit of duty. Both the appeal and stay petition are pending before the Tribunal. Inspite of it, the respondent no.3 attached the goods of the petitioner valued at Rs.1,43,000/- on 22.07.2004. Copies of the notice of attachment, panchanama and supratnama of the even date i.e.22.07.2004 are at Annexure `B' collectively. Thereafter, by letter dated 24.08.2004, respondent no.2 issued notice to sell the attached goods (Annexure `C'). Reply dated 26.08.2004 filed by the petitioner is attached at Annexure `D' contending that the appeal and stay petition of the petitioner are pending before the Tribunal. Therefore, the said action was harsh and unreasonable. Inspite of this, another notice dated 27.08.2004 was issued by the respondent no.2 calling upon the petitioner to pay forthwith, failing which the advertisement for auction would be released and the goods would be auctioned without further notice (Annexure `E'). Hence this petition.

#. On 01.09.2004, the Division Bench consisting of M.S.Shah and D.A.Mehta, JJ passed the order and granted ad-interim relief in terms of para 11B(ii).

#. Learned counsel Ms.Thakore for the petitioner stated at the bar that as ordered by the Division Bench of this

Court on 01.09.2004, the petitioner had approached the learned Tribunal, by way of urgent note dated 22.09.2004, but due to unavoidable circumstances, the learned Tribunal could not assemble and therefore it could not take up the stay application of the petitioner and decide the same on merits.

#. Ms.Thakore learned counsel for the petitioner vehemently submitted that when the appeal of the petitioner with the stay application is pending before the Tribunal, the respondent-authorities ought not to have proceeded with the coercive measures. Placing reliance on unreported judgments and orders passed by various Division Benches of this court, Ms.Thakore submits that the action be held as nullity and same may be quashed and set aside with a direction to the Tribunal to decide the stay application pending before it within a period of six weeks from the date of receipt of the order of this Court and till then, the respondent-authorities should be restrained from taking any coercive measures against the petitioners.

#. In view of the various orders passed by different Division Benches of this Court, Mr.Malkan learned standing counsel for the respondents was hardly in a position to defend the action of the authority.

#. In the instant case, the facts which are not in dispute are that against the impugned order passed by the Commissioner (Appeals) dismissing the appeal of the petitioner, the petitioner has already filed appeal along with stay application before the Tribunal way back on 05.05.2004 but due to some or the other reasons, the Tribunal was not in a position to entertain and decide the stay application on merits in accordance with law. It seems that because of the impugned circular dated 25.05.2004 (Annexure `F'), the respondent-authorities have proceeded against the petitioner by way of attachment and attached the goods of the petitioner by taking coercive measures. Mr.Malkan learned standing counsel for the respondents was right in submitting that after filing the appeal with stay application, the petitioner cannot afford to sleep over the matter for pretty long time and thereby denying the department from taking any action against it. However, no fault can be found with the petitioner if due to some or other reasons, the Tribunal before which appeal with stay application is filed is not in a position to take up and decide the stay application on merits. Unless, it is brought to the notice of the court that the petitioner is indulging in tactics to delay the hearing of appeal or

stay application, the respondent-authorities cannot proceed against the petitioner by way of coercive measures. In the instant matter, it is not the case of the respondent-authorities that due to the petitioner, delay is caused in getting its stay application decided by the Tribunal.

##. In view of above discussion, this petition is allowed and the impugned notice of attachment dated 22.07.2004 Annexure `B', auction notice dated 24.08.2004 Annexure `C' and recovery notice dated 27.08.2004 Annexure `E' are hereby quashed and set aside with liberty to the respondent-authorities to proceed against the petitioner, if the petitioner fails to obtain necessary stay order on its application filed before the Tribunal within eight weeks from today. Once the impugned notices are quashed, then the goods of the petitioner attached under the panchanama have to be returned to the petitioner. The said goods are already lying with the petitioner as per the supratnama. Therefore, no further order is required to be passed regarding the same.

##. Having regard to the facts and circumstances of the case, the CESTAT is directed to decide the stay application of the petitioner as early as possible and not later than eight weeks from today. With these observations and directions, this petition is allowed. Copy of this order be given to both the learned counsel for the petitioner Ms.Thakore and learned standing counsel Shri Malkan for the respondents to do the needful in the matter.

(B.J.SHETHNA, J)

(SHARAD D DAVE, J)

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